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No. 16-6219

In the Supreme Court of the United States

ERICK DANIEL DAVILA,
Petitioner,

v.

LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE STATE OF NEVADA AND 29 STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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CAPITAL CASE

QUESTION PRESENTED

Does the rule established in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2014)—that ineffective assistance of state habeas counsel can be seen as cause to overcome the procedural default of a substantial ineffective assistance of *trial* counsel claim—also apply to procedurally defaulted ineffective assistance of *appellate* counsel claims?

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INTEREST OF *AMICI CURIAE*

Federal habeas review "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (internal quotations and citation omitted). This case implicates these important state interests in multiple ways. First and foremost, the doctrine of procedural default is predicated on federal courts showing proper respect for state procedural rules. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) ("We now recognize the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them."). Extending *Martinez* as the Ninth Circuit has already done will continue to erode that respect and will, as a practical matter, leave little remaining of *Coleman* and the important federalism principles it effectuates in this context.

Overturning the Fifth Circuit (together with four additional circuits that have hewed to this Court's express limitations in *Martinez*), while sanctioning the Ninth Circuit's expansion of *Martinez* contrary to this Court's direction, would be to act directly at odds with this Court's instruction in *Rodriguez de Quijas v. Shearson / Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) that "the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Sending such mixed messages can only serve to further undermine provisions of 28 U.S.C. § 2254 designed to complement

the doctrine of procedural default to ensure that state courts remain the main forum for adjudicating constitutional issues arising during state criminal proceedings.

SUMMARY OF THE ARGUMENT

In *Martinez*, cognizant of state interests in comity and finality that influence every aspect of the law governing federal habeas relief under 28 U.S.C. § 2254, and seeking to balance those interests against an individual's fundamental right to be represented by counsel at trial, this Court carved a deliberately narrow exception out of the general rule that a claim of ineffective assistance of post-conviction counsel will not serve as cause to overcome a procedural default. Five circuits have taken this Court at its word about the limited nature of *Martinez*, refusing to apply its exception beyond the default of a claim of ineffective assistance of counsel *at trial* that occurs in an "initial-review collateral proceeding."[1] The Ninth Circuit, on the other hand, has singularly adopted an expansive application of *Martinez*, extending the rationale of *Martinez* to overcome the procedural default of a claim of ineffective assistance of *appellate* counsel.

The current state of procedural default in the Ninth Circuit exemplifies the problems that arise from extending *Martinez* beyond its express boundaries. The Ninth Circuit's current application of *Martinez* has essentially reverted the law on procedural default to

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[1] "Initial-review collateral proceedings" are "collateral proceedings which provide the first occasion to raise a claim of ineffective assistance of counsel at trail." *Martinez*, 566 U.S. at 8.

the "deliberate bypass" standard that this Court abandoned when it created the cause and prejudice standard in *Wainwright v. Sykes*, 433 U.S. 72 (1977), and has created significant tension with the statutory provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). This case provides this Court with an opportunity to reinforce the limited nature of the *Martinez* exception, expound upon the proper application of the *Martinez* exception in a way that will curtail the problems that result from an undue expansion of the exception, and ensure that courts equitably balance all the interests that are at play in the post-conviction arena.

In addition to the problems that the Ninth Circuit is creating with its expansive application of *Martinez*, at least two other reasons support the need for this Court to decline the Petitioner's invitation to extend *Martinez*. First, despite the Petitioner's claims to the contrary, there are principled reasons for distinguishing the right to counsel at trial from the right to counsel on appeal. The most important of those reasons, which this Court has already recognized, include significant distinctions between the role of trial counsel and the role of appellate counsel and the sources of the right to counsel at trial versus on appeal. Second, Petitioner's expansion of *Martinez* is unnecessary in any event. The fundamental miscarriage of justice exception of the procedural default doctrine remains an adequate safeguard to permit review of defaulted direct appeal claims in cases where it is more likely than not that a constitutional violation led to the conviction of someone who is actually innocent.

Beyond these principled distinctions, it is also imperative that this Court not overlook the very real *practical* effect on the States of further extending *Martinez*. Consistent with AEDPA and this Court's understanding that federal habeas review of state court convictions exists only to "guard against *extreme malfunctions* in the state criminal justice system," *Harrington*, 562 U.S. at 102-03 (emphasis added), this Court has again and again admonished the lower federal courts to rigorously circumscribe their deferential review in this context. It is no secret that some federal courts have again and again simply ignored such guidance. *See, e.g.*, *Tarango v. McDaniel*, 815 F.3d 1211, 1229 n.3 (9th Cir. 2016) (Rawlinson, J., dissenting) ("The majority makes light of the many rebukes we have received from the Supreme Court for ignoring the demanding standard under which we review habeas cases. I doubt the Supreme Court will be amused.") (citation omitted), *pet. cert. pending*, No. 16-1000 (Feb. 13, 2017). While this Court does address some of these deviations, most go uncorrected; after all, this Court is not a court of error correction. Thus, as a practical matter, the reach of this Court's purportedly minor "extensions" or "exceptions" in the habeas context often have seismic practical consequences for the States. It is proper for the Court, when considering yet another expansion of federal courts' habeas review, to take this very real practical effect into account—especially where, as explained, the proposed extension of *Martinez* is unnecessary, and therefore any supposed benefits are grossly outweighed by its mischief.

Even if there was good reason to extend *Martinez* to the appellate context, this is not the case to do it.

There is a critical distinction between this case and *Martinez* that this Court should use to help curtail the many real problems that arise when courts do not adhere to this Court's express limitations on the application of *Martinez*. Unlike in *Martinez*, where post-conviction counsel filed a notice akin to an *Anders* brief,[2] post-conviction counsel here raised three claims in the post-conviction proceeding, including a claim alleging that trial counsel failed to adequately prepare a mitigation case for the penalty phase of Davila's trial. Because it is not objectively unreasonable for counsel to decline to raise every possible non-frivolous claim—or, in *Martinez* parlance, every "substantial" claim—for appellate review, this Court should require petitioners to overcome the presumption that post-conviction counsel exercised reasoned professional judgment in deciding what claim(s) to raise in an initial-review collateral proceeding before the petitioner is entitled to any relief under *Martinez*. *Cf. Robbins*, 528 U.S. at 288 (acknowledging the different burdens of a habeas petitioner in showing deficient performance of appellate counsel that filed an *Anders* brief versus appellate counsel that filed a merits brief).

Here, the federal district court correctly found the underlying claim of instructional error particularly weak, and after layering two levels of *Strickland* deference on top of an already weak claim, Petitioner overwhelmingly fails to overcome *Strickland*'s

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[2] An *Anders* brief is a brief filed by counsel "referring to anything in the record that might arguably support" an appeal that is filed contemporaneously with a motion for counsel to withdraw on the basis that counsel finds the appeal to be frivolous. *See Smith v. Robbins*, 528 U.S. 259, 271 (2000).

deference to post-conviction and appellate counsels' judgment. This case is therefore a particularly inappropriate candidate to extend *Martinez* to the appellate context.

ARGUMENT

I. This Court should decline the invitation to extend *Martinez*.

The "main event" of a criminal prosecution is the trial. *Sykes*, 433 U.S. at 90. That is why the framers of the Constitution included an amendment in the Bill of Rights listing various protections to ensure a person accused of a crime receives a fair *trial*, among them the right to representation by counsel. *See* U.S. CONST. AMEND. VI; *see also Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 159-60 (2000) (describing the structure of the Sixth Amendment). This significant departure from English common law, which did not recognize a right to counsel for persons charged with a felony, was the basis for this Court first finding a right to counsel for defendants charged with a capital offense in *Powell v. Alabama*, 287 U.S. 45 (1932). Then, in *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963), this Court expressly recognized that the right to counsel at trial is a fundamental right that is "implicit in the concept of ordered liberty," granting everyone charged with a felony the right to appointed counsel at trial.

The right to counsel on appeal is different. As a result, there are multiple principled reasons not to extend *Martinez* to the appellate context. First, the state of the law in the Ninth Circuit demonstrates that extending *Martinez* will undermine this Court's existing procedural default jurisprudence and the

statutory provisions of AEDPA. Second, there are critical distinctions between the right to counsel at trial and the right to counsel on appeal that have already been recognized by this Court. And third, the fundamental miscarriage of justice exception to procedural default remains an adequate safeguard to protect against the possibility of appellate counsel defaulting a claim asserting a violation of the Constitution that more likely than not resulted in the conviction of someone who is actually innocent.

A. Expanding *Martinez* to include claims of ineffective assistance of appellate counsel will undermine this Court's existing procedural default jurisprudence and the dictates of AEDPA.

Forty years ago, this Court altered the test for setting aside a state procedural default by establishing the "cause and prejudice" standard in *Sykes*. The Court explained why it created the "new" standard for overcoming a procedural default: it was eradicating the perverse incentive for habeas petitioners to "sandbag" state courts that resulted from the "deliberate bypass" standard that existed under *Fay v. Noia*, 372 U.S. 391 (1963), and it also sought to ensure that federal courts accorded proper respect to the enforcement of state procedural rules. *Sykes*, 433 U.S. at 89; *see also Coleman*, 501 U.S. at 750 ("*Fay* was based on a conception of federal/state relations that undervalued the importance of state procedural rules.... We now recognize the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them.").

Inevitably, this Court was forced to address the question whether attorney errors would meet the cause requirement to overcome a default. The Court concluded that it would, but only when the error constitutes an independent violation of the constitutional right to counsel. *Murray v. Carrier*, 477 U.S. 478 (1986). And because there is no constitutional right to counsel in a post-conviction proceeding, this Court further concluded that attorney error in a post-conviction proceeding will not serve as cause for a default. *Coleman*, 501 U.S. at 752 ("Applying the *Carrier* rule as stated, this case is at an end. There is no constitutional right to an attorney in state post-conviction proceedings.") (citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Murray v. Giarratano*, 492 U.S. 1 (1989)).

Nonetheless, reaffirming the importance of the Sixth Amendment right to counsel *at trial* and the special role that trial counsel plays within the adversarial system, this Court recently carved a very narrow exception out of the general rule that attorney errors in a post-conviction proceeding will not serve as cause to overcome a procedural default. *Martinez*, 566 U.S. at 12 ("A prisoner's inability to present a claim of *trial* error is of particular concern when the claim is one of ineffective assistance of counsel. The right to counsel *at trial* is a bedrock principle in our system of justice.") (emphases added); *id.* at 16 ("the limited nature of the qualification to *Coleman* adopted here reflects the importance of the right to the effective assistance of *trial* counsel") (emphasis added). Remaining cognizant of important state interests in comity and finality and addressing the dissent's concerns that the new exception would result in

perpetual litigation, this Court made clear that the exception is limited to claims of ineffective assistance of counsel at *trial* and has no effect on defaults that occur beyond an initial-review collateral proceeding. *Id.* at 16.

While the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have heeded this Court's explicit limitations in *Martinez*, the Ninth Circuit has not. *Compare Long v. Butler*, 809 F.3d 299, 315 (7th Cir. 2015); *Reed v. Stephens*, 739 F.3d 753, 778 n.16 (5th Cir. 2014); *Hodges v. Colson*, 727 F.3d 517, 530-31 (6th Cir. 2013); *Banks v. Workman*, 692 F.3d 1133, 1147-48 (10th Cir. 2012); *Dansby v. Norris*, 682 F.3d 711, 728-29 (8th Cir. 2012), *rev'd on other grounds*, 133 S. Ct. 2767 (2013); *with Nguyen v. Curry*, 736 F.3d 1287, 1292-96 (9th Cir. 2013). And, contrary to this Court's intention that *Martinez* not create an excessive burden on the States, the Ninth Circuit's failure to adhere to the limitations of this Court's holding in *Martinez* has the effect of unwinding nearly 40 years of this Court's jurisprudence on procedural default and created irreconcilable tension with statutory provisions of AEDPA. An overly expansive application of *Martinez* reinvigorates the incentive for sandbagging that this Court sought to extinguish by abandoning the "deliberate bypass" standard in *Sykes*. *Compare Dickens v. Ryan*, 740 F.3d 1302, 1316-22 (9th Cir. 2014) (allowing a petitioner to rely on *Martinez* to avoid (1) limitations on review under 28 U.S.C. § 2254(d)(1) and *Cullen v. Pinholster*, 563 U.S. 170 (2011), and (2) limitations on evidentiary hearings under 28 U.S.C. § 2254(e)(2)), *with Moore v. Mitchell*, 708 F.3d 760, 785

(6th Cir. 2013) (rejecting petitioner's request to use *Martinez* as "a route to circumvent *Pinholster*").[3]

Additionally, the expansive application of *Martinez* creates significant tension with the statutory provisions of AEDPA. This should come as no surprise in light of this Court's prior acknowledgments that the statutory framework of 28 U.S.C. § 2254 (the exhaustion requirement, the limitations placed on merits review, and the limitations on availability of evidentiary hearings) is specifically designed to work in tandem with the doctrine of procedural default to ensure that the state courts are the main forum for litigating constitutional questions that arise in state criminal proceedings and to protect state interests in finality. *See, e.g.*, *Harrington*, 562 U.S. at 103 ("Section 2254(d) thus complements the exhaustion requirement and the doctrine of procedural bar to ensure that state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding."). When such tension arises between an equitable rule created by this Court and an act of Congress, the act of Congress must prevail.

This is not a mere theoretical problem. In search of a new trial, rather than a new appeal, habeas petitioners in the Ninth Circuit have in fact begun to use the Ninth Circuit's extension of *Martinez* to claims of ineffective assistance of appellate counsel to force

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[3] The more this Court expands the means by which a petitioner can overcome a procedural default and obtain review of his claims free of AEDPA deference, the stronger the incentive to "sandbag" the state courts becomes, wholly undermining AEDPA and the bedrock principles of comity and finality.

aside two layers of procedural defaults and require states to defend long-ago defaulted claims of trial court error that are raised for the first time in federal court.

This Court has held that a petitioner may not rely upon a procedurally defaulted claim of ineffective assistance of counsel to overcome a procedural default *unless* the petitioner is able to also satisfy the cause standard for the procedurally defaulted claim of ineffective assistance of counsel. *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000) ("To hold, as we do, that an ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted is not to say that that procedural default may not *itself* be excused if the prisoner can satisfy the cause-and-prejudice standard with respect to *that* claim."). Accordingly, habeas petitioners in the Ninth Circuit are now turning to *Martinez* as a basis to establish cause to overcome a procedural default of a claim of ineffective assistance of appellate counsel, and they then offer the same ineffective assistance of appellate counsel claim as cause to seek *de novo* review of the underlying claim of trial error in the federal habeas proceeding. *See Husband v. Ryan*, No. CV-13-1320, 2016 WL 5799039, at *7 (D. Ariz. June 21 2016); *Lippert v. Reinke*, No. 1:13-cv-00228, 2015 WL 5014359, at *8 (D. Idaho Aug. 21, 2015); *Chavez v. LeGrand*, No. 3:13-cv-00548, 2015 WL 5567284, *4-5 (D. Nev. Sept. 22, 2015); *see also Castillo v. Ryan*, No. 13-16575, App. Opening Br., at 33-35 (9th Cir. Aug. 20, 2014) (arguing the merits of the underlying *ex post facto* claim); *McKinney v. Chappell*, No. 13-55032, App. Opening Br., at 22-23 (9th Cir. Aug. 7, 2014) (noting that ineffective assistance of appellate claim was procedurally defaulted under California law

and could not serve as cause, but then turning to *Edwards* to assert *Martinez* allows ineffective assistance of post-conviction counsel to serve as cause for the default of the ineffective assistance of counsel claim); *Smith v. Ryan*, No. 2:03-cv-01810-SRB, Pet. Supp. Br. on *McKinney v. Ryan*, at 16-28 (D. Ariz. Mar. 3, 2017) (arguing IAAC claim offered as cause to overcome default of substantive sentencing error claim does not need to be independently exhausted post-*Martinez*, before briefing the underlying claim of sentencing error on the merits and seeking resentencing).

That cannot be what this Court intended in *Edwards*. The underlying basis for the holding in *Edwards* was that attorney error will not serve as cause to overcome a procedural default in the absence of an independent violation of the constitutional right to counsel that was fairly presented to the state courts, which meant that attorney errors beyond a first-appeal as a matter of right could not be asserted as cause for a procedural default. While this Court edged away from that in *Martinez*, habeas petitioners are seeking to leverage the narrow *Martinez* exception into a sea change in bedrock habeas principles. And it stands to reason that this Court did not intend for *Martinez* to open such a door when it expressly justified its limited departure from *Coleman* by distinguishing a violation of the right to the effective assistance of counsel as a form of *trial* court error worthy of special protection. *Martinez*, 566 U.S. at 12 ("A prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. The right to the effective assistance of counsel at trial is a bedrock principle in our justice system.").

In other words, despite the fact that a petitioner failed to fairly present the state's highest court with two separate constitutional violations, he is using *Martinez* in an attempt to obtain a new trial based upon *de novo* federal review of the underlying claim of trial court error rather than giving the state the option of giving the petitioner a delayed appeal to raise the defaulted claim in state court. As this Court has previously recognized, sanctioning this practice will harm state interests in comity and finality in an unprecedented manner by significantly undermining the fair presentation requirement for exhaustion and the limited scope of review under AEDPA and restoring the incentive to "sandbag" that this Court set out to prevent when it first developed the cause and prejudice standard.[4] *See, e.g.*, *Edwards*, 529 U.S. at 452 (acknowledging that this Court has repeatedly recognized "the inseparability of the exhaustion rule

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[4] This is particularly problematic in any instances where reasonable disagreements between the state and federal courts about the scope of this Court's clearly established holdings would otherwise preclude federal habeas relief under AEDPA. If the federal standard under prevailing circuit precedent is more favorable to defendant/petitioner than the state's reasonable interpretation of this Court's holdings, the defendant/petitioner has an incentive to withhold his claim in state court to avoid AEDPA review and seek *de novo* review in a later federal habeas proceeding. But that is precisely what procedural default and AEDPA are designed to prohibit, *Harrington*, 562 U.S. at 102-03 (noting habeas review is "not a substitute for ordinary error correction through appeal" and that AEDPA review "complements the exhaustion requirement and the doctrine of procedural bar to ensure that *state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding*") (emphasis added).

and the procedural-default doctrine"). This should be reason enough for this Court to decline to extend the equitable rule created in *Martinez* because (1) it works an injustice against the States by giving habeas petitioners an incentive to twice over deprive the state of the opportunity to correct an alleged constitutional error and reopening direct appeal issues years after the conclusion of the trial; and (2) an equitable rule like *Martinez* should not supersede Congress's clear intent expressed through AEDPA.

B. There are principled distinctions between the right to counsel at trial versus on appeal.

Petitioner faults the five circuits that have declined to extend *Martinez* to the appellate context for not identifying a principled distinction between claims of ineffective assistance of trial counsel versus appellate counsel. Putting aside that lower courts can hardly be faulted for taking this Court at its word, *Rodriguez de Quijas*, 490 U.S. at 484, there are principled distinctions between the roles of appellate and trial counsel that undermine Petitioner's request for this Court to extend *Martinez*.

1. The right to counsel at trial is a fundamental right that is enumerated in the Sixth Amendment, while the right to counsel on appeal is not.

Notwithstanding the Ninth Circuit's suggestion otherwise, *see Nguyen*, 736 F.3d at 1293-94, the right to counsel on appeal is not enumerated in the Sixth Amendment. Unlike the fundamental right to counsel at trial, which *is* referenced in the Sixth Amendment,

the right to counsel on appeal exists as a matter of due process and equal protection to ensure indigent persons are not deprived of basic access to the courts. *Ross v. Moffitt*, 417 U.S. 600, 607 (1974) ("The decisions discussed above stand for the proposition that a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons."). The history and tradition behind the right to counsel at trial is traced back to the roots of our nation, while the right to counsel on appeal is only a modern creation that does not carry the same protections bestowed upon the right to counsel at trial. *See id.* at 610 (distinguishing the fundamental right to counsel at trial from the right to appellate counsel).

2. Appellate counsel plays a different role than trial counsel.

"There are significant differences between the trial and appellate stages of a criminal proceeding." *Id.* The trial stage of the criminal process is focused on the State's efforts "to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt." *Id.* Because the State has haled the accused into court, it must provide him with counsel to force the State to meet its high burden and protect the rights of the accused. *Id.* "By contrast, it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or a jury below," transforming counsel's role on appeal from defending the status quo to assailing the status quo by attacking the lower court's judgment. *Id.*

Additionally, good appellate advocacy requires counsel to select the claims that maximize a client's ability to prevail on appeal—not raise every conceivable meritorious claim. That is why *Strickland* compels courts to presume that counsel exercised reasoned professional judgment in deciding which issues to raise on appeal. *Robbins*, 528 U.S. 259, 288 (acknowledging the distinction between evaluating appellate counsel's performance when counsel files an *Anders* brief and when counsel files a merits brief); *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983) (acknowledging effective appellate advocates narrow the issues on appeal by selecting the strongest claim(s) to raise).[5]

This Court has already repeatedly recognized the constitutional significance of the distinction between trial counsel's role and appellate counsel's role. Consistency therefore does not require an extension of the extraordinary trial court remedy that this Court created in *Martinez*; indeed, it militates against it.

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[5] Petitioner asserts that Texas failed to offer some strategic reason why counsel did not present the instructional error claim on appeal. Notwithstanding the fact that Texas did offer strategic explanations for counsel decision-making on appeal, *see* Br. in Opp. at 14, 17, 19, Petitioner's argument is based upon a fundamental misunderstanding of *Strickland*. *Strickland* requires courts to *presume* that counsel's performance fell within the wide range of acceptable strategic decisions, and it is the *petitioner*'s burden to overcome that presumption, not the State's.

3. Where effective trial counsel makes appropriate objections, at least one court will have ruled upon the petitioner's claim of error.

In *Martinez*, this Court was particularly concerned that, absent an exception, "no court will review the prisoner's claims." 566 U.S. at 10-11; *see also Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013) ("[W]here the State consequently channels initial review of this constitutional claim to collateral proceedings, a lawyer's failure to raise an ineffective-assistance-of-*trial*-counsel claim during initial-review collateral proceedings, could (were *Coleman* read broadly) deprive a defendant of *any* review of that claim at all".). But this Court was understandably not concerned with that issue in *Coleman*, because the default there was post-conviction counsel's failure to file a timely appeal from Coleman's initial state habeas proceeding. Thus, "one state court ha[d] addressed Coleman's claims: the state habeas trial court." *Coleman*, 501 U.S. at 757. And this Court in *Martinez* made clear that the general rule of *Coleman* still applies to any defaults resulting from an appeal of an initial-review collateral proceeding. *Martinez*, 566 U.S. at 16.

This is a key distinction between this case and *Martinez*. Where, as in *Martinez*, trial counsel fails to make an appropriate objection, *and then* post-conviction counsel also defaults a claim that counsel was ineffective for failing to object, the underlying claim will never receive *any* judicial consideration absent the *Martinez* exception. In contrast, where trial counsel does make the appropriate objection, but appellate counsel fails to raise it on appeal, at least one

court has reviewed the possibility of error: the trial court. Moreover, where trial counsel made an objection, but *two* subsequent counsel (direct appeal and state habeas) did not raise it, there should be a strong presumption that the objection lacks merit (or at least was not one of petitioner's stronger claims). Thus, a default in a direct appeal such as this case is less analogous to the situation presented by *Martinez*, and more like a default occurring during an appeal from an initial-review collateral proceeding.

4. Where effective trial counsel preserved an appropriate record for appeal, a habeas litigant can review that record to identify claims that were not raised on direct appeal.

Finally, as this Court has noted on prior occasions, the need for effective counsel is diminished when a petitioner is able to rely on the trial record and the work of prior counsel to raise possible claims of error. *Compare Martinez*, 566 U.S. at 11-12 (noting that inmates pursuing first-tier review in a post-conviction proceeding are ill equipped to make claims of ineffective assistance of trial counsel because they are without the work of prior counsel to rely upon), *with Ross*, 417 U.S. at 615 (acknowledging that an unrepresented appellant in a discretionary review setting can rely upon the trial court record and prior appellate briefing to set forth his claims of error). That distinction applies in this context as well. Where effective trial counsel has created a record that properly preserves errors for review, a habeas petitioner is capable of reviewing that record to identify the claims of error that trial counsel preserved for

review and compare that to the briefing from his first direct appeal to determine what claims of error appellate counsel did and did not raise on appeal.

C. The fundamental miscarriage of justice exception to procedural default is an adequate safeguard to protect a habeas petitioner against the possibility of ineffective appellate counsel.

Critical to this Court's decision in *Martinez* was a concern that an innocent person would lose the opportunity to raise a viable claim of ineffective assistance of trial counsel. *Martinez*, 566 U.S. at 12 (quoting *Powell*, 287 U.S. at 68-69). That justification for the *Martinez* exception overlooks an important point: the fundamental miscarriage of justice exception will excuse a petitioner's inability to establish cause for a procedural default where it is more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt. *Carrier*, 477 U.S. at 495-96; *see also Schlup v. Delo*, 513 U.S. 298, 323-32 (1995).

This point is especially salient here. Requiring a showing of actual innocence undercuts the incentive for "sandbagging" the state courts that is otherwise created by extending *Martinez* to this new context. As a result, this Court should not extend the *Martinez* exception any further because the fundamental miscarriage of justice exception serves as an adequate safeguard to allow habeas petitioners to have defaulted constitutional claims addressed on the merits, while the actual innocence gateway more equitably balances the petitioner's interest in having his defaulted claims

heard on the merits against the backdrop of state interests in comity and finality.

II. This is not the case to extend *Martinez* because Petitioner has not even remotely shown that post-conviction counsel was ineffective for not raising this claim.

Even if this Court is of a mind to extend *Martinez* to this new context, this is not the case to do it. Instead, this case provides this Court with an ideal opportunity to provide much needed guidance on the application of *Martinez*.

Martinez should not be read to indicate that post-conviction counsel's performance was deficient simply because counsel failed to raise a "substantial" claim of ineffective assistance of counsel. *Strickland* requires courts to presume that counsel exercised reasoned professional judgment, and it is the habeas petitioner's burden to overcome that presumption. *Strickland v. Washington*, 466 U.S. 668, 687-91 (1984). In the post-conviction context—as has already been noted in the appellate context—this Court should presume that post-conviction counsel exercised reasoned professional judgment in selecting the claims to raise "to maximize the likelihood of success" on post-conviction review. *Robbins*, 528 U.S. at 288 ("In *Jones v. Barnes*, 463 U.S. 745 (1983), we held that appellate counsel who files a merits brief need not (*and should not*) raise every nonfrivolous claim, but rather may select from them in order to maximize the likelihood of success on appeal.") (emphasis added). Thus, *Strickland* places a dramatically heavier burden on the petitioner challenging the performance of an attorney that filed a merits brief on appeal, than an attorney filing an

Anders brief indicating counsel could not identify any non-frivolous claims to raise on appeal.

This case provides this Court with an opportunity to establish that post-conviction counsel's performance is to be viewed under the same deferential standard. In *Martinez*, post-conviction counsel filed the equivalent of an *Anders* brief, indicating she could not identify *any* claims of ineffective assistance of counsel. 566 U.S. at 18. Here, post-conviction counsel presented three issues in the state post-conviction proceeding, including a claim that trial counsel was ineffective for failing to investigate and develop mitigating evidence for the penalty phase of trial. J.A. at 133-39.

And because *Strickland* deference regarding an attorney's performance is to be based upon counsel's perspective at the time of his actions, 466 U.S. at 689, post-conviction counsel's performance should be evaluated from the view that post-conviction counsel will understand that appellate counsel is presumed to have exercised reasonable judgment in selecting the issue(s) to raise on appeal. In other words, an evaluation of post-conviction counsel's performance in reviewing prior counsel's performance should be doubly deferential.

Here, the federal district court concluded that the underlying claim of instructional error lacked merit because the "jury charge, taken as a whole" was consistent with Texas law. J.A. at 367-68. Thus, the instructional error claim was not a particularly strong issue to raise on appeal, undermining the validity of Petitioner's claim that appellate counsel was ineffective for failing to challenge the jury instructions on appeal. Given the weak nature of the claim of ineffective

assistance of appellate counsel, Petitioner here cannot overcome the deference owed to post-conviction counsel under *Strickland*. Accordingly, this case is not in a posture for this Court to extend *Martinez* because an extension of *Martinez* will only further confuse the lower courts without helping Petitioner.

CONCLUSION

There are many reasons this Court should not extend *Martinez* to claims of ineffective assistance of appellate counsel. The Amici States therefore respectfully request that this Court affirm the judgment of the Fifth Circuit.

Respectfully submitted,

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